IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.463 OF 2004

and

ARBITRATION PETITION NO.464 OF 2004

The Cosmos Co-operative Bank Ltd. ... Petitioner

vs.

M/s.A.C.Enterprises And others. .... Respondents.

Mr.A.Y.Sakhare i/b. Varsha Palav & Sarang Aradhye, for Petitioner.

Mr.Jaideep Mitra i/b. Ms.Trupti Gohil & Jay Gohil, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 20th September,2005

P.C.:-

1. The petitioner in both the petitions are same. The sole Arbitrator has also passed the common order. Therefore, both the petitions can be conveniently disposed of by a common order. The petitioner is a Co-operative Society registered under the Maharashtra Co-operative Societies Act,1960 and is also registered under the Multi-

State Co-operative Societies Act,2002. It is a bank governed by the provisions of the Banking Regulation Act. The petitioner-Bank has filed a claim under Section 84 of the Multi-State Co-operative Societies Act,2002, before the Arbitrator by name Mr.A.R. Vazalwar. The petitioner-Bank had in fact filed two claims. In both the claims, the Respondent no.1 M/s.A.C. Enterprises and Shri.Niren Mansukhlal Shah were common party. One claim was for Rs.2,08,280.05/- with interest and that claim was registered as Claim no.5. The other claim was for Rs.1,14,524 with interest and that claim was registered as Claim no.6. In both these claims as mentioned above, M/s.A.C.Enterprises and Mr.Niran M.Shah were the common parties. The claim no.5 was decided by the learned Arbitrator by Award dated 19.12.2003. the operative part of the Award dated 19.12.2003 passed in Claim no.5 reads as under:-

> "In the result, I hereby order that the respondent Nos.1 to 3 who are jointly and severally liable, shall pay the amount of Rs.2,08,280.05/- with interest at the rate of 17% per annum on Rs.2,08,272.05/- (Notice charges excluded) till realization of the entire amount. If any amount is paid to the Claimant bank, after the filing of the claim, the same be adjusted in the amount due by the

> respondents to the Claimant bank. The Respondents shall also bear the costs of Rs.10,914.00/-, which the claimant bank is entitled to."

It may be noted here that during the trial of the claim/reference Mr.Niren M.Shah who was Respondent no.4 did not appear and contest the claim. Obviously, therefore, in the operative part of the Award there was a typographical error in as much as the Award was not passed against Mr.Niren M.Shah. It may be pointed out here that when the Award dated 19.12.2003 was made in claim no.5, the claim no.6 was not decided and was pending before the Arbitrator. After the Award was made in claim no.5, the petitioner Bank found that by mistake the Award was not made against Mr.Niren M.Shah and hence, the petitioner–Bank made an application under Section 33 of the Arbitration & Conciliation Act, 1996 for correction of typographical error in the Award and requested the Arbitrator to make correction in the Award so that the Respondent no.4 viz. Mr.Niren M.Shah is also made liable to pay the amount alongwith the other respondents. That application filed under Section 33 of the Act, was decided by the the learned Arbitrator by order/award dated 17.9.2004. By that Award/order, the learned Arbitrator has also passed Award in respect of claim no.6. In these two claims the petitioner Bank was claiming total amount of Rs.3,66,228/- with interest at the rate of 17% per

annum. By the fresh Order/Award dated 17.9.2004, the learned Arbitrator has directed Mr.Niren M.Shah and Mr.Ashish D.Shah to pay Rs. Rs.3,00,000/- in lump sum in full and final settlement of the claim. By these petitions, the order/Award dated 17.9.2004 is challenged by the Bank. The submission on behalf of the Bank is that the order/award is totally and completely beyond the jurisdiction of the Arbitrator. The learned Arbitrator has totally mis-directed himself in making the said Award. So far as the claim no.5 is concerned, there was already an Award made and therefore, there was only an application made by the Bank for correction of typographical error. The learned Arbitrator in paragraph no.2 of his order/Award dated 17.9.2004 has observed that the mentioning of respondent nos.1 to 3 in the operative part of the Award dated 19.12.2003 was a typographical error. Therefore, the only thing that could have done by the learned Arbitrator in so far as claim no.5, is to correct the typographical error. Under Section 33 of the Act, the learned Arbitrator in no case could have modified the Award made in claim no.5.

2. So far Claim no.6 is concerned, the learned Arbitrator does not have power to make the Bank to accept any sum less than the sum claimed by the Bank as full and final settlement without recording the finding as to how the Bank is not entitled to claim the entire amount of claim claimed by the Bank. Thus the order/award made by the learned

Arbitrator is clearly beyond the power and scope of the learned Arbitrator. Really speaking the order dated 17.9.2004 made by the learned Arbitrator amounts to total and complete mis-conduct on the part of the learned Arbitrator. There was absolutely no justification for the learned Arbitrator to make the Award. I really do not know how the learned Arbitrator has proceeded to make such order/award. The type of the order/award that has been made by the learned Arbitrator is not befitting the person who was formerly the judicial officer.

3. On behalf of the respondent nos. 3 and 4, the only submission made was that as the petitioner-bank has accepted the pay order of Rs.3,00,000/-, the petitioner-bank cannot challenge the order by these petitions and therefore, these petitions are not maintainable. The pay order was accepted by the petitioner-bank by letter dated 11.10.2004. That letter reads as under:-

> "Please take notice that the pay order no.777929 dtd.15.09.2004, drawn on State Bank of India, Matunga Branch for Rs.3,00,000/- favouring Cosmos Co-operative Bank A/c. A.C.Enterprises forwarded alongwith your letter dtd.17.09.2004 towards the awarded amount in the aforesaid arbitration proceedings, will be realised

without prejudice to the rights and contention of the Cosmos Co-op. Bank to challenge the said award dtd.17.09.2004 by filing arbitration petition in the High Court."

The learned Counsel appearing for the Respondents relying on the judgment of the learned Single Judge of this Court in the case "M/s.Govindji Jevat and Co. Vs. Shree Saraswati Mills Ltd., AIR 1982 Bombay 76" submits that as the amount under the order has been accepted by the Bank though under protest, the petitions filed by the Bank are not maintainable. On the other hand, the learned Counsel appearing for the petitioner relies on the judgment of the Constitution Bench of the Supreme Court in the case "Bhau Ram Vs. Baij Nath Singh and others, AIR 1961 Supreme Court 1327" and submits that as the petitioner was entitled to the amount of Rs.3,00,000/- in any case on the merit of the claim and not as a matter of bounty and therefore, as per the award the action of the bank of accepting the pay order, will not preclude the petitioner bank from filing the petitions. As the judgment of the Constitution Bench of the Supreme Court is the judgment on the point which arises for consideration, I will have to consider only the judgment of the Supreme Court. In my opinion, the observations of the Supreme Court in paragraph 7 of the Judgment are relevant which reads as under:-

"7. It seems to us, however, that in the

absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal. The phrase "approbate and reprobate" is borrowed from Scots Law where it is used to express the principle embodied in the English doctrine of election, namely, that no party can accept and reject the same instrument (per Scrutton L.J.in Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.Ltd., 1921-2 KB 608. The House of Lords further pointed out in Lissenden v. C.A.V.Bosch Ltd., 1940 AC 412 that the equitable doctrine of election applies only when an interest is conferred as an act of bounty by some instrument. In that case they held that the withdrawal by a workman of the compensation money deposited by the employer could not take away the statutory right of appeal conferred upon him by the Workmen's Compensation Act. Lord Maugham, after pointing out the limitations of the doctrine of approbate and reprobate

observed towards the conclusion of his speech:

> "It certainly cannot be suggested that the receipt of the sum tendered in any way injured the respondents. Neither estoppel nor release in the ordinary sense was suggested. Nothing was less served than the principles either of enquiry or of justice."

It is clear from the observations of the Supreme Court that if a party is entitled to benefit on merits then accepting of that benefit does not preclude the party from challenging the order. The Supreme Court in paragraph no.12 of the judgment has observed thus:-

> "12. It seems to us that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in Tinkler's case, (1849) 154 ER 1176 to cases like the present. In our judgment it must be limited only to those

> cases where a person has elected to take a benefit otherwise than on the merits of the claim in the lis under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the pre-emption price has not taken a benefit de hors the merits. Besides, this is not a case where restitution is impossible or inequitable. Further, it seems to us that the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. In the case before us there was no such choice before the appellant, and, therefore, his act in withdrawing the pre-emption price cannot preclude him from continuing his appeal. We, therefore, overrule the preliminary objection. The appeal will now be set down for hearing on merits. The cost of this hearing will be costs in the appeal."

In view of the clear law laid down by the Supreme Court above, in my opinion, it cannot be said that the petitions filed by the petitioner are not maintainable. It is further to be considered that the pay order was

accepted by the petitioner Bank under protest and without prejudice to the petitioner's rights and contentions to challenge the order. The learned Counsel also relies on the observations in the judgment of the Supreme Court in the case "(2004)2 Supreme Court Cases 663, Chairman and MD, NTPC LTD. Vs. Reshmi Constructions, Builders and Contractors". Taking overall view of the matter, therefore, in my opinion, looking at the matter from any point of view, the order made by the learned Arbitrator which is under challenge in the petitions cannot be sustained. In the result therefore, both the petitions succeed and are allowed. Both the petitions are granted in terms of prayer clause (a) excluding bracketed portion. The respondents are directed to pay costs of these petitions to the petitioner as incurred by the petitioner. Office is directed to send a copy of this order to Shri.K.S.Bhoria, the Central Registrar, Co-operative Societies, Government of India, Ministry of Agriculture, Department of Agriculture & Co-operation, Office of the Central Registrar (Co-operative Societies), Krishi Bhavan, New Delhi, for his information and necessary action.